APPEAL NO. 001132

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 18, 2000. The hearing officer determined that the appellant's (claimant) request for spinal surgery should not be approved. The claimant filed two appeals, both timely. In one appeal, the claimant contends that her second opinion spinal surgery doctor had not rendered an opinion, as he was waiting for some additional tests which the claimant says the hearing officer ordered. The claimant said the additional tests were performed but that the hearing officer rendered his decision before the tests could be considered by the claimant's second opinion doctor. The claimant's second appeal, dated two days later, contains much of the information of the first appeal plus adds a letter dated May 4, 2000, from Dr. Mc, the claimant's second opinion spinal surgery doctor, where Dr. Mc references some tests and concludes "I concur with the propose [sic] spinal surgery of Dr. RM, the claimant's treating doctor. The claimant requests that we reverse the hearing officer's decision and render a decision that she is entitled to the spinal surgery at the respondent's (carrier) expense. The claimant also states that the carrier's adjuster has agreed to pay for the proposed surgery. The appeals file does not contain a response from the carrier and efforts to contact the carrier have been unsuccessful.

DECISION

Reversed and remanded.

This is a spinal surgery case which is governed strictly by the Texas Workers' Compensation Commission (Commission) rules and Section 408.026 of the 1989 Act. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(e)(1) (Rule 133.206(e)(1)) provides that the treating doctor or surgeon shall submit a form (Recommendation for Spinal Surgery (TWCC-63)) for the recommendation for spinal surgery and advise the employee of the right to seek a second opinion. Both the employee and the carrier have the right to seek second opinions from a Commission list of doctors. Rule 133.206(k)(4) then provides:

> (4) Of the three recommendations and opinions (the surgeon's, and the two second opinion doctors'), presumptive weight will be given to the two which had the same result, and they will be upheld unless the great weight of medical evidence is to the contrary. The only opinions admissible at the hearing are the recommendation of the surgeon and the opinions of the two second opinion doctors.

The parties stipulated that the claimant sustained a compensable spinal injury on December 22, 1997, opening and moving lamps in the employer's warehouse. The claimant testified that she has undergone three periods of physical therapy, she has had two CT scans and a discogram, she has had three MRIs and three "ESI" (epidural steroid injections) without relief. On the TWCC-63, Dr. RM, the claimant's treating doctor,

recommended a "2 level percutaneous Discectomy L4-5 & L5-S1." Dr. S, the carrier's second opinion doctor, nonconcurred in a report dated July 30, 1999, stating that he found "the MRI . . . unremarkable" and that he did not think percutaneous diskectomies "are going to help [claimant]."

Dr. Mc, the claimant's second opinion doctor, on a form dated January 20, 2000, nonconcurred, checking information which stated that he needed to review additional records and he has requested them and that "[f]urther testing is needed before [he] can render an opinion." In a letter of the same date to the Commission, Dr. Mc commented on the reason for his nonconcurrence and in another letter dated February 2, 2000, Dr. Mc commented:

> Prior to consideration for spinal surgery, I would recommend a pre-discogram psychological evaluation, followed by a lidocaine discogram of the postulated painful disk.

In evidence is a handwritten memo dated April 14, 2000, which indicated that Dr. RM had tried to schedule the claimant for the tests recommended by Dr. Mc but that the carrier had denied those tests "saying they were medically unnecessary." That note is supported by a letter dated April 13, 2000, from the carrier denying the requested tests. Also in evidence are reports from Dr. RM refuting Dr. S's report and nonconcurrence and various MRI and discogram results.

With this information, the hearing officer found that Dr. Mc had not agreed to the recommended surgery and found that the great weight of the medical evidence (presumptive weight) was contrary to Dr. RM's recommendation. The claimant, in her appeal, states that the hearing officer "instructed the carrier's attorney to approve those tests, and they were approved the same day." Our review of the evidence on the record does not support that statement. The claimant states in her appeal that the psychological evaluation was done "on April 25th, and two lidocaine discograms on April 27th, 00"; that the results were sent to Dr. Mc, Dr. RM, and the Commission on May 4, 2000; but that the hearing officer had rendered his decision on May 3, 2000, the day before the test results were in. The claimant asserts that the carrier's adjuster had agreed on May 9, 2000, to pay for the surgery but there is no confirmation of that allegation from the carrier. The claimant's (timely) second appeal contains the report dated May 4, 2000, from Dr. Mc concurring in the proposed spinal surgery procedure of Dr. RM.

We do not normally consider evidence submitted for the first time on appeal; however, in certain cases we do remand the case for the hearing officer to consider the newly submitted evidence. To determine whether evidence offered for the first time on appeal requires that case be remanded for further consideration, we consider whether it came to the appellant's (in this case, the claimant's) knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993;

Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In this case, the requested tests were certainly discussed but not available at the CCH, Dr. Mc's report is not cumulative, the failure to have the test results and Dr. Mc's report was not through the claimant's lack of diligence, and requested tests were so material as to change Dr. Mc's mind. Consequently, we remand the case for the hearing officer to consider Dr. Mc's May 4, 2000, report.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Dorian E. Ramirez
Appeals Judge